Office-Supreme Court, U.S.
FILED
DEC 4 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 483

JOHN J. CASALE, INC.,

Appellant,

AGAINST

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY TO APPELLEES' MOTION TO AFFIRM

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Preliminary Statement

Appellant submits this brief reply to the motion to affirm because the appellees plainly misconceive and misconstrue the nature and content of the opinion of the court below and the Report of the Commission.

1. Appellees state that the district court upheld the Commission because the Commission "looked at the totalities of the situation" in determining the character of appellant's services (M. A. 2, 5, 6),* and reached its decision by following the guidelines provided by *United*

* The symbol "M. A." refers to the motion to affirm followed by the page number.

States v. *Drum*, 368 U. S. 370 (1962). The fact is that the Commission did no such thing. Reference in its report to the "total situation" was restricted to the control issue exclusively (J. S. 43).* The Commission said, in effect, that control of "the physical operation" by lessees of vehicles is not "so different as to warrant a finding that it is engaged in *bona fide* private carrier transportation" when the "total situation", namely, the "over-all operation" is reviewed (J. S. 43). But the district court imported into this simple comment a non-existent finding by the Commission of the "burden of transportation" test when, in fact, there is nothing at all in the Commission's Report which remotely suggests that anything but control was in issue. Appellees incorrectly claim (M. A. 6) that the Commission "carefully adhered to the standards approved by this court in the *Drum* case".

It was the district court which disregarded the instructions against re-writing reports of the Commission and the Appellees happily attached themselves to this safari into an area which the district court, and not the Commission, explored.

Appellees' reliance upon the Commission's conclusion that the Appellant's proposed arrangement would relieve lessees of responsibility for drivers is plainly misplaced (M. A. 4). To begin with, the district court did not adopt this conclusion, but even if it did, the conclusion was designed by the Commission to support the adverse determination on the question of control and not to implement the "burdens of transportation" criterion. In any event, only naivete about the pattern of industrial labor relations can account for this erroneous conclusion about

* The symbol "J. S." refers to the Jurisdictional Statement followed by the page number.

"responsibility as employer". The *fact*, as found by the Commission, was that the labor agreement which covered the employment of drivers and helpers operating leased vehicles was signed by appellant *as agent* for the lessees (J. S. 36) and the employment arrangement, as well as the individual employment agreement, was between the lessee and the driver (*J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332 [1944]).

2. The appellees are wrong when they contend that appellant construed this court's decision in *United States* v. *Drum*, *supra*, as limiting "the burdens of transportation" test to cost factors (M. A. 7). Appellant merely recited the text of this court's definition (J. S. 11) to demonstrate that *none* of the elements was considered or discussed by the Commission *in this case*. Moreover, this court did not say that the Commission could, on a case by case basis, define and redefine the phrase "burdens of transportation". But even if it did, the contention is irrelevant because the Commission decided *this case* on the control issue and the district court embarked on its own judicial adventure in upholding the Commission on the basis of the *Drum* case, *supra*.

CONCLUSION

The Motion to Affirm Should Be Denied.

December 3rd, 1962.

Respectfully submitted,

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